THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELECTRONIC SERVICES, INC.	:	
	:	
Plaintiff,	:	
	:	**C.A. NO.: 03-394 E**
v.	:	
	:	
CENTRAL TRANSPORT	:	
INTERNATIONAL, INC. and	:	
LOGISTICS PLUS, INC.	:	
	:	
Defendants.	:	

DEFENDANT CENTRAL TRANSPORT INTERNATIONAL, INC.'S
PROPOSED JURY INSTRUCTIONS AND INTERROGATORIES

Defendant, Central Transport International, Inc. requests the following jury instructions and interrogatories as follows. Central Transport reserves the right to request modifications, additions and the withdrawal of these instructions and questions as appropriate:

Respectfully submitted,

BY : /s/ Jeffrey Cohen
Jeffrey D. Cohen, Esquire
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Attorneys for Defendant
Central Transport International, Inc.

Dated: October 14, 2005

1. GENERAL JURY INSTRUCTIONS

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you are the judges of the facts. Do not consider any statement that I have made during the trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

In civil cases such as this one, the plaintiff has the burden of proving those contentions that entitle him or her to relief. When a party has the burden of proof on a particular issue, the party's contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not. To put it another way, think, if you will, of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant, or are equally balanced, your verdict must be for the defendant.

Pennsylvania Suggested Standard Civil Jury Instructions 5.50.

2. INSTRUCTIONS ON CREDIBILITY OF WITNESSES

As judges of the facts, you are the only judges of the credibility of the witnesses and their testimony. This means that you must judge the truthfulness and accuracy of each witness' testimony and decide whether to believe all, or part, or none of that witness' testimony. The following are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe witnesses: (1) Was the witness able to see, hear, or know the things about which he or she testified? (2) How well could the witness remember and describe those things? (3) Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental, or intellectual deficiency? (4) Did the witness testify in a convincing manner? How did the witness look, act, and speak while testifying? Was the testimony uncertain, confused, self-contradictory, or presented in any kind of evasive manner? (5) Did the witness have any interest in the outcome of the case, or any bias, or any prejudice, or any other motive that might have affected the testimony? (6) How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other evidence and testimony? (7) Does the testimony make sense to you? (8) If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy cast doubt upon the rest of that same witness' testimony. This may depend on whether the inaccuracy is in an important matter or in a minor detail. (9) You should also consider any possible explanation for the inaccuracy. Did the witness make an honest mistake or simply forget, or was there a deliberate attempt to present false testimony to you? (10) If you find that a witness deliberately testified falsely on a material point, that is, on a matter that might affect the outcome of the trial, you may, for that reason alone, choose to disbelieve other parts or all of that same witness' testimony. But you are not required to do so. You should consider all the other factors that bear on credibility in determining whether to believe other parts of that witness' testimony. (11) While you are judging the credibility of each witness, you are likely to be judging the credibility of other witnesses or other evidence in the case. If there is a real irreconcilable conflict, it is up to you to decide which, if any, of the conflicting testimony or evidence you believe. As the only judges of credibility and fact in this case, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever credibility and weight you think it is entitled to receive.

Pennsylvania Suggested Standard Civil Jury Instructions 1.44.

3. INSTRUCTIONS ON NUMBER OF WITNESSES

The number of witnesses offered by one side or the other does not, in itself, determine the weight of the evidence. It is a factor, but only one of many factors that you should consider. Whether the witnesses appear to be biased or unbiased or whether they are interested or disinterested persons, are among the important factors that indicate the reliability of their testimony. The important thing is the quality of the testimony of each witness. In short, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence; but which witness or witnesses, and which evidence, you consider most worthy of belief. Even the testimony of one witness may outweigh that of many, if you have reason to believe his or her testimony in preference to theirs. Obviously, however, where the testimony of the witnesses appears to you to be of the same quality, the weight of numbers assumes particular significance.

Pennsylvania Suggested Standard Civil Jury Instructions 5.03.

4. INSTRUCTIONS ON CONFLICTING TESTIMONY

You may find inconsistencies in the evidence. Even actual contradictions in the testimony of witnesses do not necessarily mean that any witness has been willfully false. Poor memory is not uncommon. Sometimes a witness forgets; sometimes he or she remembers incorrectly. It is also true that two persons witnessing an incident may see or hear it differently.

If different parts of the testimony of any witness or witnesses appear to be inconsistent, you the jury should try to reconcile the conflicting statements, whether of the same or different witnesses, and you should do so if it can be done fairly and satisfactorily.

If, however, you decide that there is a genuine and irreconcilable conflict of testimony, it is your function and duty to determine which, if any, of the contradictory statements you will believe.

Pennsylvania Suggested Standard Civil Jury Instructions 5.03.

5. INSTRUCTIONS ON WILLFULLY FALSE TESTIMONY

If you decide that a witness has deliberately testified falsely about a material point (that is, about a matter that could affect the outcome of this trial), you may for that reason alone choose to disbelieve the rest of the witness' testimony. But you are not required to do so. You should consider not only the deliberate falsehood, but also all other factors bearing on the witness' credibility in deciding whether to believe other parts of the witness' testimony.

Pennsylvania Suggested Standard Civil Jury Instructions 5.03.

You may consider circumstantial evidence and you should give it whatever weight you believe it deserves.

Pennsylvania Suggested Standard Civil Jury Instructions 5.07.

7. INSTRUCTION ON WHAT IS EVIDENCE

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents, and other things received as exhibits in court. It also may include any facts that have been stipulated to or formally agreed to by the parties and any facts that have been judicially noticed--that is, facts that I say you must accept as true.

Certain things are not evidence. I will list those things for you now:

(1) Statements, arguments, questions, and comments by lawyers are not evidence.

(2) During the course of the trial, you will hear from the attorneys on numerous occasions. Always bear in mind that the attorneys are *not* witnesses and what they say is *not* evidence in the case, whether they are arguing, objecting, or asking questions. The attorneys are here as advocates and spokespersons for their clients' positions.

(3) Objections are not evidence. Lawyers have a right to object. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

(4) Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

(5) Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Pennsylvania Suggested Standard Civil Jury Instructions 1.48.

8. INSTRUCTION ON DEPOSITION AS SUBSTANTIVE EVIDENCE

The testimony of a witness who for some proper reason cannot be present to testify in person, may be presented in the form of a deposition. Such testimony is given under oath and in the presence of attorneys for the parties, who question the witness. A court reporter takes down everything that is said and then transcribes the testimony. This form of testimony is entitled to neither more nor less consideration by the jury because of the manner of its submission.

Pennsylvania Suggested Standard Civil Jury Instructions 2.05.

9. INSTRUCTIONS ON TWO OR MORE PARTIES - DIFFERENT LEGAL RIGHTS

You should decide the case as to each party separately. Unless otherwise stated, the instructions apply to all parties. I have two more cautionary instructions before I define the types of damages you may award, if you find that the plaintiff has proved liability according to the standards I have enumerated.

First, you should not award compensatory damages more than once for the same injury. For example, if a plaintiff were to prevail on two claims and establish a one dollar injury, you could not award him one dollar compensatory damages on each claim--he is only entitled to be made whole again, not to recover more than he lost. Of course, if different injuries are attributed to the separate claims, then you must compensate him fully for all of the injuries.

Second, you must be careful to impose any damages that you may award on a claim solely upon the defendant or defendants who you find to be liable on that claim. Although there are two defendants in this case, it does not follow that if one is liable, all or any one of the others are liable as well. Each defendant is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must impose damages for that injury only upon that defendant.

Nevertheless, you might find that more than one defendant is liable for a particular injury. If two or more persons unite in an intentional act that violates another person's right, then all of those persons are jointly liable for the acts of each of them; the law does not require the injured party to establish how much of the injury was done by each particular defendant that you find liable. Thus, if you find that the defendants who you find to be liable acted jointly, then you may treat them jointly for purposes of ongoing damages. If you decide that both of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down into individual percentages. *Modern Civil Jury Instructions § 77-2.*

10. INSTRUCTION ON GENERAL DAMAGES

Damages are awarded only if injury were foreseeable to a reasonable person. Special damages such as lost profits and other non-foreseeable damages are only awarded if actual notice was given to the carrier of the possibility of injury.

Globe Refining Company v. Land Cotton Oil Company, 190 U.S. 540, 23 S. Ct. 754, 47 L. Ed. 1171 (1903).

11. INSTRUCTION ON RECOVERY OF DAMAGES

When a shipper or its agent arranges for transportation of freight and declares a value for freight, and the carrier makes a rate accordingly, the shipper is prevented from recovering in case of loss or damage for any amount greater than the value declared in the agreement to ship the freight. Kansas City Southern Railway Company v. Carl, 227 U.S. 639 (1919)

12. INSTRUCTION ON REASONABLY FORESEEABLE

Damages recoverable for fright loss and damage only include damages reasonably foreseeable at the time the parties entered into the agreement to ship the goods. If the damages are not foreseeable, then they are only recoverable if specific notice was given by the Plaintiff to the Defendants of special circumstances and consequences of damage to the cargo, and the Defendants agreed to bear the risk of these damages.

Richter v. North American Van Lines, 110 F. Supp.2d 406, 413 (D. Md. 2000), Main Road Bakery, Inc. v. Consolidated Freightways, Inc., 799 F. Supp. 26, 28 (D. NJ 1992), collecting cases including Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc., 661 F.2d 761, 765 (9th Cir. 1981), 11 Williston on Contracts § 1344 at 226-29 (3d ed 1968).

13. INSTRUCTION ON AGENCY

Agency is a relationship that is created when one party, called a principal, obtains another party, called an agent, to perform services for him or her and to act on his or her behalf, but subject to the principal's right of control.

A principal is bound by, and liable for, the acts his or her agent does with actual or apparent authority from the principal, and within the scope of the agent's employment.

An act is considered within the agent's authority if:

(1) the principal granted express authority to perform the act; *or*

(2) the act was proper, usual, and necessary to the exercise of the authority actually granted by the principal; *or*

(3) the principal's words or conduct would lead a reasonably prudent person to believe that the principal has granted the agent the authority to perform certain acts or if the principal puts the agent into, or knowingly permits the agent to occupy, a position in which, according to ordinary experience and habits, it is usual for the agent to have authority of a particular kind. In determining whether the agent had apparent authority, you should look to the actions of the principal, rather than the agent. However, a third party is not entitled to rely on the apparent authority of the agent if he or she has actual knowledge of the limitations of the agent's authority; *or*

(4) the principal knew or should have known that the agent was exercising powers not granted to him or her but the principal fails to take reasonable steps to notify others of the limitations of the agent's authority, and a third party

justifiably changes his or her position based on his or her reasonable belief that the agent possesses the authority.

If you find that Logistics Plus was acting within the scope of its authority with the principal, Accu-Spec is bound by and liable for the acts of Logistics Plus.

If you find that Logistics Plus acted without authority or beyond the scope of its agency or authority, but find also that its acts were subsequently ratified by Accu-Spec, either expressly or by accepting and retaining the benefits of such acts, you may find Accu-Spec bound by and liable for the acts of Logistics Plus.

Pennsylvania Suggested Standard Civil Jury Instructions 4.00B.

14. INSTRUCTION ON CONSTRUCTIVE KNOWLEDGE

A shipper is deemed to have constructive knowledge of the contents of a carriers' tariff (also, if a shippers agent has this knowledge, the shipper is deemed to have this knowledge as well). Additionally, factors such as the shipper or its agent's level of sophistication, experience, or prior course of dealings with a carrier to show a shipper's constructive knowledge.

First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc., 731 F.2d 1113, 1116-17 (3d Cir. 1984); Carmana Designs Ltd. v. North American Van Lines, Inc., 943 F.2d 316, 321 (3d Cir. 1991).

15. INSTRUCTIONS ON FRAUD

Five elements must be established to find that fraud occurred:

(1) a misrepresentation;

(2) an utterance of the misrepresentation by Accu-Spec and/or Logistics Plus;

(3) an intention by Accu-Spec and/or Logistics Plus to induce Central Transport to act by the utterance;

(4) justifiable reliance by Central Transport upon the misrepresentation; and

(5) damages to Central Transport as result of its reliance on the misrepresentation.

To establish the second element, an utterance of the misrepresentation, you must find that

(1) Accu-Spec's and/or Logistics Plus' intent was knowing or reckless; and

(2) They knew or believed the matter was not as represented, did not have confidence in the accuracy of the representation as stated or implied, or knew that there was no basis for the representation as stated or implied.

Pennsylvania Suggested Standard Civil Jury Instructions 15.34.

16. WHEN A MISREPRESENTATION MAKES A CONTRACT VOIDABLE

For a misrepresentation to make a contract voidable three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material. Second a misrepresentation must have induced the recipients to make the contract. Third the recipient must have been justified in relying upon the misrepresentation. A representation need not be fraudulent in order to make a contract voidable.

In re Allegheny International, Inc. v. Snyder, 954 F.2d 167, 178-179 (3d Cir. 1992); Germantown Manufacturing Co. v. Rawlinson, 341 Pa. Super. 42, 48-50, 491 A.2d 138, 141-143 (1985); Restatement 2d of Contracts §164 (1981).

17. MISREPRESENTATION DEFINED

A misrepresentation is an assertion that is not in accord with facts. A statement intended to be truthful may be a misrepresentation because of ignorance or carelessness.

Germantown Manufacturing Co. v. Rawlinson, 341 Pa. Super. 42, 48-50, 491 A.2d 138, 141-143 (1985); Restatement 2d of Contracts § 159 (1959).

18. WHEN A MISREPRESENTATION IS FRAUDULENT OR MATERIAL

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his consent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.

(2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his consent, or if the maker knows that it would be likely to induce the recipient to do

Germantown Manufacturing Co. v. Rawlinson, 341 Pa. Super. 42, 48-50, 491 A.2d 138, 141-143 (1985); Restatement 2d of Contract § 162 (1981).

19. INSTRUCTIONS ON INCORPORATION BY REFERENCE

Generally, all writings which are part of the same transaction are interpreted together. One application of this principle is the situation where the parties have expressed their intention to have one document's provision read into a separate document. So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, non-contemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned. It is not necessary to refer to or incorporate the entire document; if the parties so desire, they may incorporate a portion of the document.

Capricorn Power Co. v. Siemens Westinghouse Power Corp., 324 F. Supp. 2d 731, 749 (W.D.Pa. July 2, 2004); Restatement 2d of Contracts §132 (1981).

20. INSTRUCTIONS ON ELEMENTS OF PROOF – CLAIM

In this case, there is a claim by the Plaintiff. You may find for or against the Defendants. The Plaintiffs have the burden of proving each of the following by a preponderance of the evidence:

1. Plaintiff contracted with Defendant Logistics Plus for the transport of an x-ray machine from Fremont, California to McKean, Pennsylvania.
2. Defendant Logistics Plus on behalf of Accu-Spec contracted with Defendant Central Transport for Central Transport to be the carrier of the Accu-Spec freight.
3. Defendant Central Transport received the x-ray machine in good condition at origin.
4. The x-ray machine was damaged during the time it was in transit.
5. The demo x-ray machine was new equipment.
6. It was foreseeable to Central Transport at the time the agreement to ship was made that the container contained an x-ray machine.
7. It was foreseeable to Central Transport at the time the agreement to ship was made that any damage to the x-ray machine would have to be evaluated by a representative of the manufacturer from England.
8. It was foreseeable to Central Transport at the time the agreement to ship was made that any damage to the x-ray machine would have to be repaired at the manufacturer's England location.
9. Actual damages to the demo x-ray machine.

See citations for each element as set forth in preceding jury instructions

21. CONCLUDING INSTRUCTIONS

You now have all the rules of law to properly reach a verdict in this case. In a few minutes, you will begin your deliberations. Before you do so, I would like to give you a few final guidelines on conducting your deliberations and properly arriving at a verdict.

My responsibility, as judge, is to decide all questions of law; therefore, you must accept and follow my rulings and these instructions as to matters of law. But I am not the judge of the facts. You, the jurors, are the only judges of the facts. So your responsibility is to consider the evidence and decide what are the true facts. By applying the rules of law as given to you, to the facts as you find them, you must determine whether the plaintiff has proven its claims.

The decision in this case, as I am sure you understand, is a matter of considerable importance. Your responsibility, as jurors, is to reach a verdict based on the evidence presented during the trial, and upon your evaluation of that evidence. You must consider all the testimony you have heard, and all the other evidence presented during this trial, in order to determine the facts.

In deciding the facts, you may properly apply common sense and draw upon your own everyday practical knowledge of life. You should keep your deliberations free of any bias or prejudice. All parties have the right to expect you to consider the evidence conscientiously, and to apply the law as I have outlined it to you.

Before you begin to deliberate, you should select one of your group to be the foreperson. The foreperson will announce the verdict in this courtroom after you have finished deliberating. If, during deliberations, you have a serious doubt about some portion of these instructions, write your question in a note, signed by the foreperson. Give the note to the bailiff. The bailiff will give it to me for response. You should not, however, reveal to anyone how the jury stands numerically.

The verdict should be rendered only after careful and thoughtful deliberations. In the course of your deliberations, you should consult with each other and discuss the evidence freely and fairly, in a sincere effort to arrive at a just verdict. It is your obligation to consider the evidence and the issues presented with a view toward reaching agreement, if you can do so without violating your own individual judgment. Each juror must decide this case for him- or herself, after examining the issues and the evidence with proper regard to the opinions of other jurors. Proper consideration of the issues before you means that you should be willing to reexamine your views and change your opinion, if convinced that it is erroneous; but you are not required to surrender an honest conviction as to the weight or effect of the evidence only because of another juror's opinion, or solely for the purpose of returning a verdict.

Your verdict must represent the jury's considered, final judgment. While the view of every juror must be considered, your verdict need not be unanimous. A verdict rendered by five-sixths of the jury shall constitute the verdict of the entire jury. Five-sixths of twelve is ten. So when ten of you have agreed that you have reached a verdict, indeed, you have. You should tell the bailiff, and we will reconvene court to accept your verdict.

Please keep in mind that this dispute between the parties is, for them, a most serious matter. They and the court rely upon you to give full and conscientious consideration to the issues and the evidence before you. Neither sympathy nor prejudice may influence your deliberations. You should not be influenced by anything other than the law and the evidence in this case, together with your own judgment and evaluation of that evidence. All parties stand equally before the court, and each is entitled to the same fair and impartial treatment in your hands.

In closing, I suggest that you will be able to deliberate more easily, and in a way that will be better for all concerned, if each of you treats your fellow jurors and their views with the same courtesy and respect as you want your views to be treated, and with the same courtesy and respect as you would treat any other person in your everyday life.

You may begin your deliberations.

Pennsylvania Suggested Standard Civil Jury Instructions 20.00.

Attached to this Jury Charge is a Verdict Form that contains questions. Before answering a particular question on the Verdict Form, you must consider the instructions for that question provided below. Bear in mind, members of the jury, that you may or may not ultimately answer every question on the verdict form. Carefully follow the "roadmap" instructions contained below and on the Verdict Form to determine which questions you must answer.

Submitted the _____ day of ___________________, 2005 at _________o'clock _____.m.

____

UNITED STATES DISTRICT JUDGE

JURY INTERROGATORIES

1. Did Defendant Central Transport receive the cargo in good condition?

Yes _____ No _____

If you answered "yes," proceed to the next question.
If you answered "no," then answer no further questions.

2. Was the cargo damaged during the time it was in transit?

Yes _____ No _____

If you answered "yes," proceed to the next question.
If you answered "no," then answer no further questions.

3. Was Logistics Plus, Accu-Spec's agent with respect to the agreement with Central Transport.

Yes _____ No _____

4. Did Logistics Plus make a material misrepresentation on the bill of lading for the shipment by stating that the freight was Class 50?

Yes _____ No _____

If you answered "yes," skip all other questions and proceed to question 11.
If you answered "no," proceed to next question.

5. Did Defendant Logistics Plus make a fraudulent misrepresentation on the bill of lading for the shipment by stating that the freight was Class 50?

Yes _____ No _____

If you answered "yes," skip all other questions and proceed to question 11.
If you answered "no," proceed to next question.

6. Was it reasonably foreseeable to Defendant trucking company at the time the agreement to ship was made, that if the cargo was damaged, that Plaintiff would have to have the damage inspected by a representative of the manufacturer from England?

Yes _____ No _____

Proceed to next question.

7. Was it reasonably foreseeable to Defendant trucking company at the time the agreement to ship was made, that if the cargo was damaged, that Plaintiff would have to send the cargo to England to be repaired?

Yes _____ No _____

Proceed to next question.

8. Was the demo X-ray machine "used" for purposes of the Central Transport tariff.

Yes _____ No _____

Proceed to the next question.

9. Did Defendant Central Transport's Tariff limit liability for the transportation of the demo X-ray machine to 10 cents per pound?

Yes _____ No _____

Proceed to the next question.

10. What amount, if any, is Plaintiff entitled to recover from Central Transport?

Defendant Central Transport- Answer in Dollars and Cents:

____

11. What amount, if any, is Plaintiff entitled to recover from Logistics Plus?

Defendant Logistics Plus- Answer in Dollars and Cents:

____

CERTIFICATE OF SERVICE

This is to certify that on this, the 14th day of October 2005, a copy of the foregoing Defendant Central Transport International, Inc.'s Proposed Jury Instructions and Interrogatories was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Thomas A. Pendleton, Esquire
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I hereby certify that on this, the 14th day of October 2005, a copy of the foregoing Defendant Central Transport International, Inc.'s Proposed Jury Instructions and Interrogatories was served via facsimile, upon the following:

W. John Knox, Esquire
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